STATE OF MICHIGAN
IN THE SUPREME COURT

CITIZENS PROTECTING MICHIGAN'S CONSTITUTION, JOSEPH SPYKE, and JEANNE DAUNT,

Plaintiffs-Appellants,

v.

SECRETARY OF STATE, and MICHIGAN BOARD OF STATE CANVASSERS,

Defendants/Cross-Defendants-Appellees,

and

VOTERS NOT POLITICIANS BALLOT COMMITTEE, d/b/a VOTERS NOT POLITICIANS, COUNT MI VOTE, a Michigan Non-Profit Corporation, d/b/a VOTERS NOT POLITICIANS, KATHRYN A. FAHEY, WILLIAM R. BOBIER and DAVIA C. DOWNEY,

Intervening Defendants/Cross-Plaintiffs-Appellees.
_____/

Supreme Court Case No. 157925
Court of Appeals Case No. 343517

PLAINTIFFS-APPELLANTS' REPLY TO INTERVENING-DEFENDANTS' RESPONSE TO APPLICATION FOR LEAVE

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Statement of Questions Presented on Reply

Plaintiffs stand by their Statement of Questions Presented in their Application.

The Response filed by Intervening Defendants (collectively "VNP"), however, adds issues, arguments, and authority not contained or addressed in the Application for leave, including, among other things, the issue of the constitutionality of MCL 168.482(3).

MCR 7.305(E) provides that an appellant may file a reply brief in support of an application for leave within 21 days after the service of an answer. Though this Court granted Plaintiffs' Application for Leave (Order dated July 6, 2018), Plaintiffs file this Reply to the Response filed by VNP to address the arguments and authority raised therein.

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I. Introduction

This controversy is not about whether a redistricting commission is a good idea. And it is not about whether the VNP Proposal is too multifarious or complex. This controversy is about whether the Constitution can be changed through the Const 1963, art 12, § 2 amendment process:

1. *without* telling the People that various existing provisions will be nullified; and

2. to modify the core structure of government by authorizing *a new superagency* that (a) combines powers of all three branches, (b) has no binding redistricting criteria to apply, (c) has an unlimited budget, and (d) is not subject to checks and balances.

For nearly a century, Michigan's courts have held that a change to the core structure of government constitutes a *revision*, not an amendment.[1] The Constitution does not permit revisions to occur by ballot proposal, instead requiring their refinement and submission to voters via a convention. Const 1963, art 12, § 3. The People can call such a convention at any time.[2]

The Court of Appeals panel and VNP have failed to appropriately address these two questions in the manner directed by precedent. The panel's application of this Court's decision in *Protect Our Jobs* would effectively decimate that decision. Further, its focus on VNP's red herring "single purpose" argument led the Court of Appeals to ignore the question of whether the VNP Proposal would make fundamental changes in the Constitution.

Plaintiffs prevail because the abrogations at issue are plain, and the modifications to the structure of Michigan's form of government are severe. The People deserve a convention to study the changes proposed, and to be advised of how their Constitution will be changed.

II. The Court of Appeals decision decimates *Protect Our Jobs*.

Contrary to what VNP states (see VNP Br., pp. 7-10), Plaintiffs do not advance an "indirect effect" test for abrogation. Plaintiffs advance the appropriate, narrow test described in *Protect Our Jobs v Bd of State Canvassers*.[3] (App., p. 11.) The VNP Proposal petition fails that narrow test.

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[1] *Kelly v Laing*, 259 Mich 212, 222; 242 NW 891 (1932).

[2] VNP incorrectly asserts that a Convention may *only* be called every 16 years. (VNP Br., p. 40.) The People can initiate a convention or the Legislature can refer the question to the People in a shorter period, as was done in 1960 after the convention question failed to pass in 1958.

[3] 492 Mich 763; 822NW2d 534 (2012).

The test finds an abrogation where there would be a nullification of existing constitutional text. 492 Mich at 779-780. *Protect Our Jobs* makes plain that nullification, however, need not exist as to an entire section—even a small abrogation must be republished. *Id.* at 784. Notwithstanding that signatures had been gathered to support the casino proposal at issue in *Protect Our Jobs*, for example, the abrogation of a single word—"complete" (as concerned the liquor control commission's authority)—was enough to withhold the proposal from the voters.

This is a key defect in the Court of Appeals' analysis. The below table juxtaposes the language of *Protect Our Jobs* with that of the Court of Appeals panel here:

Protect Our Jobs	***COA Decision***
"This abrogation analysis requires consideration of not just the whole existing constitutional provision, but also the provision's discrete subparts, sentences, clauses, or even, potentially, single words. If the proposed amendment renders wholly inoperative any one of those discrete components, then the petition must republish the entire provision." *Id.* at 784.	"Plaintiffs have taken a very broad view of the *Protect Our Jobs* standard, arguing that '*any* abrogation,' even a slight one, requires republication. A restriction, however, is not an abrogation …." (COA OP., p. 25.)
"Because complete control necessarily communicates the exclusivity of that control, *any* infringement on that control abrogates that exclusivity." 492 Mich at 790-791. "The proposed section would nullify the 'complete' control currently established by the Constitution by taking specific decisions whether to grant or deny a liquor license to the newly established casinos out of the 'control' of the commission." *Id.* at 791.	"[T]he VNP Proposal can be harmonized with Const 1963, art 6, § 13 because the only effect is that the circuit court will not have jurisdiction over the commission. In all other respects, Const 1963, art 6, § 13 remains unaffected. The existing constitutional provision has not been eviscerated." (*Id.* at 24.)

As shown above, the Court of Appeals panel improperly found that minor restrictions, infringements, or nullifications of absolute language are not really abrogations—e.g., that depriving the circuit court of *some* of its original jurisdiction is not an abrogation of the Constitution's command that the circuit court shall have original jurisdiction "in all matters." This is contrary to *Protect Our Jobs*. 492 Mich at 790-91.

If the Court of Appeals panel had decided *Protect Our Jobs*, Michigan may well have eight more casinos today. If the four nullifications identified by Plaintiffs are not "abrogations," it is difficult to see what could be. Allowing the panel's decision to stand will erode the test established by this Court. The meaning of "abrogation" is important both as concerns the petition republication requirement and the ballot republication requirement in Const 1963, art 12, § 2. Its definition should not be eroded in such a manner, and the Court of Appeals should be reversed.

III. VNP's Response fails to harmonize the abrogated sections of the Constitution.

VNP's Response did not rehabilitate the Court of Appeals panel's flawed abrogation analysis. VNP spends most of its response addressing the abrogations of Const 1963, art 9, § 17 (concerning appropriations) and Const 1963, art 11, § 1 (concerning tests for office), but its arguments in both respects are unavailing.

A. "Shall indemnify" means "shall pay."

The VNP Proposal cannot be harmonized with Const 1963, art 9, § 17:

VNP Proposal, art 4, § 6(5)	***Const 1963, art 9, § 17***
"The State of Michigan shall indemnify commissioners for costs incurred if the legislature does not appropriate sufficient funds to cover such costs."	"No money shall be paid out of the state treasury except in pursuance of appropriations made by law."

"To indemnify" means "to reimburse" or "to compensate."[4] When the VNP Proposal says that the State "shall indemnify" the commissioners "if the legislature *does not* appropriate" sufficient amounts, it plainly means that the State "shall compensate" or "shall reimburse" the commissioners for amounts *not* covered by an appropriation, and without limitation.

The panel and VNP conflate the appropriation process with "indemnification." They invent *from nothing* a convoluted framework whereby unreimbursed commissioners first obtain a declaratory judgment and then a writ of mandamus to compel an appropriation. (COA Op., p. 26; VNP Br., pp. 12-13.) That is not what the Proposal says. The Proposal says that the State "shall

[4] See Oxford Dictionary, "Indemnify," https://en.oxforddictionaries.com/definition/us/indemnify; Black's Law Dictionary (10th), "Indemnify" ("To reimburse (another) for a loss suffered because of a third party's or one's own act or default").

indemnify" (*i.e.,* shall compensate, shall reimburse) the commissioners "if the legislature does not appropriate" sufficient amounts. The abrogation could not be more absolute.

VNP asks in its Response Brief: "Where, in the proposed amendment, is the language commanding that the Treasury Department pay money out of the State Treasury without an appropriation?" (VNP Br., p. 13.). It is underlined in the table, above.[5]

The abrogation is plain and simple. So too was the duty to republish. MCL 168.482(3).

B. Forcing applicants to swear an oath as to their political beliefs *is* a political test.

The VNP Proposal requires that an applicant to the commission must, under oath, swear to their political affiliation. Commissioners will be chosen for service *based* on that affiliation.

As Plaintiffs detailed in their Application, the "Oath Clause" in Const 1963, art 11, § 1 prohibits political tests for office—the government cannot, under the Oath Clause, force a citizen to choose a political philosophy as a condition for office. (App., p. 21 (citing *Advisory Opinion on Constitutionality of 1975 PA 227,* 396 Mich 465, 510; 242 NW2d 3 (1976).) But that is precisely what the VNP Proposal requires. Persons who refuse to verify their affiliation under oath are ineligible to sit on the commission. (See VNP Proposal, art 4, § 6(2)(D)(i).) This change is an abrogation and thus required republication.

VNP's attempt to confine the Oath Clause to "continuing oaths" (i.e., an oath to uphold a party's purposes or beliefs once in office) is contrary to both *Harrington v Vaughn,* 211 Mich 395; 179 NW 283 (1920) and *Advisory Opinion*. Both hold that the Oath Clause was designed to prevent the government from requiring persons to identify their political beliefs as a condition for holding office *in the first instance*. The Court of Appeals wholly missed the relevant passages in both decisions, which passages are quoted at length in Plaintiffs' Application. (*App.,* pp. 19-21.)

VNP bizarrely cites to *Attorney General v Board of Councilmen of the City of Detroit*, 58 Mich 213; 24 NW 887 (1885) for the proposition that the Oath Clause "was never to preclude

[5] VNP apparently believes that "to indemnify" does not mean "to reimburse" or "to compensate," though it gives no explanation as to what else it could reasonably mean.

application of legitimate qualifications for public employment." (VNP Br., p. 16.) In that case, the Supreme Court *invalidated*, under the Oath Clause (in the 1850 Constitution), a statute providing for the appointment of election commissioners exclusively from each of the two leading political parties. *Id.* at 217. The Court explained that "inquiries into party affiliation" are wholly unlike "other qualifications often required for public service, such as education, scientific … and the like." *Id.* The Court added that establishing partisan discriminations as a condition for holding office is "as repugnant to the rights of voters in selecting as to the rights of those chosen in assuming office …." *Id.* The case VNP cites[6] thus actually *bars* attempted harmonization between the Oath Clause and the partisan discriminations the VNP Proposal would enact.

VNP's political affiliation test is at odds with the Oath Clause. If a political affiliation test is to be inserted in the Constitution, the People should be made aware that the Oath Clause will be abrogated. The VNP petition failed to republish, and rejection is thus required. MCL 168.482(3).

IV. VNP's arguments that substantial compliance is available or that MCL 168.482(3) is not constitutional are meritless.

VNP dedicates most of its Response (pp. 21-36) to arguments that the republication requirement is not constitutional or is not subject to strict compliance. Its focus on these arguments shows the weakness of its arguments concerning whether abrogations have occurred.

A. Strict compliance is required.

Substantial compliance is not available to save petitions that are defective under section 482 of the Election Law. *Stand Up for Democracy v Sec'y of State*, 492 Mich 588; 822 NW2d 159 (2012). VNP claims that strict compliance with the requirements of section 482(3)—which uses the mandatory "shall"—should not be required because "this Court's decision in [*Stand Up*]

[6] VNP cites two additional decisions (VNP Br., p. 16)—*Attorney General v Reading*, 268 Mich 224; 256 NW 432 (1934) and *Attorney General v Parsell*, 99 Mich 381; 58 NW 335 (1894)—for the proposition that consideration of political affiliation may be permitted when making appointments to public bodies. But the statutes in these two cases contained no affirmative political affiliation *or* disclosure requirement. Both allowed for the appointment to a board of "not more than" a certain number of a political party's members—but said nothing of requiring persons to swear their affiliation in advance or prohibiting their selection based on such oath.

did not consider … cases involving a voter-initiated petition for amendment of the Constitution …" and thus "is not binding as authority in this case." (VNP Br., p. 33, 34.)

Plaintiffs omit (as they did when making this argument below) that this Court *expressly* stated in *Stand Up* that it found "a clear intent that petitions for … *constitutional amendments* strictly comply with the form and content requirements of the statute." *Id.* at 594, 601-602 (emphasis added). And in *Protect Our Jobs* (which considered *only* a constitutional amendment) the Court held unequivocally that "the principle articulated in *Stand Up* applies with equal force here…." 492 Mich at 778. This Court not only required strict compliance with the republication requirement, but applied the remedy of keeping the Casino Proposal off the ballot.

B. The republication requirement is constitutional.

VNP next argues that the republication requirement is unconstitutional. (VNP Br., pp. 23-31.) The Constitution states that the Legislature may "prescribe the form" of petitions (Const 1963, art 12, § 2), but is silent as to substantive requirements. VNP asserts the republication requirement is a matter of substance and thus is not authorized.

The republication requirement—which has been Michigan law since 1941[7] and was 22 years old when the 1963 Constitution added language stating that the Legislature was to "prescribe the form" of petitions—is plainly a form requirement. It places no substantive limits on *what* can be abrogated; it merely requires that *if* a section is abrogated, it be republished.

An abrogation is the nullification of existing language. It is as much a part of a proposed amendment as the addition or direct deletion of text. If a proposal supporter does not understand what is being abrogated, they do not understand their own proposal. It is not an unreasonable burden to require the republication of abrogated sections to alert the People of changes to their

[7] See former C.S. 6.685(12). The same Legislature that, in 1941, drafted and referred the amendment adding the constitutional requirement that abrogated sections be republished *on the ballot*, also enacted the *petition* republication requirement. Further, when adopted, in the body of the statute, the Legislature denoted the petition republication requirement to be one concerning the "form of [the] petition." *Id.* Plaintiffs included, as Exhibit 2 to their Response and Reply filed below, a summary of this important historical context. That exhibit is incorporated here by reference. VNP omits this important history from its argument.

Constitution. And where a proposal adds several thousand new words and strikes over a thousand more as does the VNP Proposal, it is no surprise that multiple abrogations have occurred.

Though this Court has not previously and expressly decided the constitutionality of section 482(3), there is language in in its prior decisions supporting its validity. In addition to calling the republication requirement "invited," (*Protect Our Jobs*, 492 Mich at 778) and "beckoned" (*Carman v Hare*, 384 Mich 443, 448; 185 NW2d 1 (1971)) by Const 1963, art 12, § 2, this Court, in *Carman,* implicitly rejected a constitutional attack on section 482(3) when it stated that Proposal C of 1970 should have been enjoined prior to its ultimate submission to the voters. A summary of these authorities, as well as *Ferency v Sec'y of State*, 409 Mich 569; 297 NW2d 544 (1980) and *Massey v Sec'y of State,* 457 Mich 410; 579 NW2d 862 (1998)—which VNP sorely mischaracterizes—was included at Exhibit 3 to Plaintiffs' Response and Reply filed below (and that Exhibit 3 is incorporated here by reference).

As set forth in the referenced exhibit to Plaintiff's Response and Reply filed below, there are three key points that VNP omits in their Brief with respect to these cases:

- First, *Massey,* like *Carman*, involved a *post-election* challenge. The relative burdens and available remedies in pre-election cases change dramatically once an election has occurred. See *Stand Up,* 492 Mich at 606; *Carman*, 384 Mich at 455.

- Second, when VNP cites these cases to suggest that petition defects arising under section 482(3) can be cured by "corrective action" pre-election (VNP Br., p. 22), VNP is fundamentally mischaracterizing these cases. The pre-election "corrective action" referenced was not a "cure" that would save the defective petition, but the courts' *enjoining submission of the question* altogether (as it did in *Protect Our Jobs*). *Carman,* 384 Mich at 455.

- Third, in 1986, this Court forcefully receded from the background principles in *Ferency* that are cited and discussed at length by VNP. See *Consumers Power Co v Att'y Gen*, 426 Mich 1; 392 NW2d 513 (1986). Those principles applied to the 1908 Constitution, not the 1963 Constitution. 426 Mich at 9.

V. The quantitative/qualitative analysis is longstanding Michigan law.

VNP asserts that there should be no substantive difference between what can be achieved as an "amendment" under Const 1963, art 12, § 2 and as a "revision" under Const 1963, art 12, §

3. (VNP Br., pp. 37-39.) They exhort this Court to depart from the qualitative/quantitative framework expounded in *Citizens*, claiming it to be "borrowed primarily from decisions of other states." (*Id.*, p. 44.) This, however, ignores this Court's decision in *Kelly v Laing*, 259 Mich 212, 217 (1932) confirming that there is a qualitative difference between "amendment" and "revision."

At issue in *Laing* was a series of amendments to a city charter. The Court began by explaining that "revision" "suggests fundamental change," but an "amendment" is a "correction of detail." 259 Mich at 217. While an "amendment" was likely to have little "effect upon other provisions," a revision required a convention, "which experience has shown [to be] best adapted to make necessary readjustments" in other sections of the governing document. *Id.* at 221-222.

The Court then turned to the various changes included in the petition at issue. The *Laing* Court concluded, for example, that a proposal to increase the number of city commissioners from five to nine would be classified as an *amendment*. Conversely, transferring powers from the city manager to other officers would constitute a *revision*. The Court noted that "[the city manager's] office is an integral part of the form of government, and to abolish and transfer his duties and powers to the commission would result in a *substantial* change of such form." *Id.* at 222. Further, a change of this kind would have affected directly or by implication 52 sections of the charter (relating to the city manager). The Court stated that based on "***both from the number*** of changes in the charter ***and the result upon the form of government***, the proposal … requires revision of the charter, and must be had by the method the statute provides therefore." *Id.* at 223-224 (emphasis added). *Laing* thus established a *quantitative and qualitative* framework.[8] It further established that even a relatively simple and straightforward change—i.e., shifting powers from a city manager to a commission—can constitute a *fundamental* change.

The VNP Proposal changes 3 articles of the constitution and 11 sections; it adds more than 3,000 words and deletes more than 1,000 more; and it changes the manner in which the State's

[8] See also *id.* at 222 ("The ***extent of the changes as well as their character*** undoubtedly would require a revision." (Emphasis added)).

lawmakers are chosen. It would work a *fundamental* change to the *form* of Michigan's government for the primary reason that it would establish a commission that extracts powers from each to the three existing branches *but which is subject to none of the checks and balances that apply to these same branches*. The governor cannot veto plans; the Legislature cannot create budgets or remove commissioners; and the courts cannot craft remedial plans.[9]

The *form* of government is changed further in that the VNP Proposal removes the redistricting task from the hands of the People's elected representatives—as well as the People themselves[10]—and places it in the hands of unelected laypersons, without a budget or judicial control. It further directs these laypersons to draw plans without any binding criteria. The commission is nothing like the commission created by the existing provisions of Const 1963, art 4, § 6. Among other things, the 1963 commission was constrained by binding, constitutional criteria including detailed land area-population formulas. When this Court invalidated those formulas,[11] it also invalidated the *entire* commission: this Court found it "unthinkable" that the

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[9] This shifting of powers of multiple branches to an independent *pension* commission, without ancillary checks and balances, was one of the principle reasons the California Supreme Court rejected the initiative at issue in *McFadden v Jordan*, 196 P.2d 787, 798 (Cal 1948) (cited below and by the Court of Appeals in *Citizens*). Like the commission in the VNP Proposal, the pension commission in *McFadden* had "practically uncontrolled power over the funds collected," including "absolute power to give reimbursement or compensation;" its commissioners also could not be removed by the governor or courts. In rejecting the initiative, the *McFadden* court held that: "The delegation of far reaching and mixed powers to the commission, largely, if not almost entirely in effect, unchecked, places such commission substantially beyond the system of checks and balances which heretofore have characterized our governmental plan." *Id.*

[10] While the People can presently make use of the initiative and referendum powers to propose their own redistricting plans or to invalidate the Legislature's plans under Const 1963, art 2, § 9, that will no longer be true if the VNP Proposal is adopted (since the initiative and referendum powers only extend to laws the Legislature may itself enact). The VNP Proposal would thus, ironically, foreclose future direct legislation with respect to redistricting plans.

[11] The Court invalidated the application of a weighted land area-population formula as violating the one-person one-vote standard under *Reynolds v Sims*, 377 US 533 (1964). As the commission was no longer viable, this Court instead appointed a special master, and devised a detailed set of rules (based on the historical primacy of following political subdivision lines) for him to use in drawing redistricting plans. Those rules have since been codified. MCL 3.63; MCL 4.261.

important responsibility of redistricting might be left to an unelected administrative body operating essentially without specific, binding rules. *In re Apportionment of State Legislature*—1982, 413 Mich 96, 136-137, 140; 321 NW2d 565 (1982).

The VNP commission will have no binding criteria. The Proposal places primary emphasis on the criteria that "districts shall reflect the state's diverse population and communities of interest"—terms which have no definition and which give essentially unfettered discretion to the commission. (See VNP Proposal, art 4, § 13(C).) The VNP Proposal next requires that districts shall reflect "accepted measures of political fairness." (*Id.*, § 13(D).) There are *no such accepted measures*. *Gill v Whitford*, 585 US ___ (2018) (slip. op. 8-12).

The VNP Proposal's use of nebulous criteria, in descending order of priority, also assures this Court will be repeatedly vexed by litigation each cycle as interest groups and voters mount challenge after challenge to redistricting plans on the basis that the plans fail to recognize particular "communities of interest" or do not adhere to "accepted measures of political fairness." This Court must hear those matters while exercising original jurisdiction. VNP Proposal, art 4, § (6)(19).

The VNP Proposal's disruption to the ordinary structures of Michigan's state government will be severe; the People deserve the benefit of a constitutional convention to study and refine these changes before their implementation, and the Constitution requires one.

VI. Conclusion

For the reasons stated herein, this Court should reverse the decision of the Court of Appeals and issue an order of mandamus directing Defendants to reject the VNP Proposal.

Respectfully submitted,
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